United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-2287

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 74-2287

HAROLD A. LIPTON and IRVING LEVIN,

Plaintiffs-Appellants,

—against—

ROBERT J. SCHMERTZ,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

HAROLD A. LIPTON and IRVING H. LEVIN,

Plaintiffs-Appellants,

-against-

ROBERT J. SCHMERTZ,

Defendant-Appellee.

On Appeal From An Order Of The
United States District Court
For The Southern District of New York

APPELLEE'S BRIEF

Statement

Plaintiffs/appellants ("plaintiffs") appeal from an order of the United States District Court for the Southern District of New York (Motley, J.), entered on September 30, 1974, which: (1) struck the registration in the Southern District pursuant to 28 U.S.C. § 1963 of a judgment of the

United States District Court for the Central District of California in the amount of $4,221,047.57 obtained by plaintiffs against the defendant/appellee ("defendant") and entered on July 25, 1974; (2) denied plaintiffs' application for an order of attachment and struck the filing of plaintiffs' complaint seeking a judgment in the Southern District based upon the judgment of the California District Court; and (3) except as otherwise ordered by the California District Court or the United States Court of Appeals for the Ninth Circuit, and except in the State of California, permanently restrained the enforcement of the judgment of the California District Court pending the final determination of defendant's appeal from the aforesaid judgment.

Facts

On September 11, 1974 plaintiffs, purportedly acting pursuant to 28 U.S.C. § 1963, registered a judgment in the amount of $4,221,047.57 in the Southern District of New York that had been entered against the defendant Robert J. Schmertz on July 25, 1974, in the United States District Court for the Central District of California. (Appendix I, 4A) The Certification of Judgment reflects that a notice of appeal from the

California judgment was filed in respect thereto on August 12, 1974.

Subsequent to the registration of the California judgment in the Southern District the plaintiffs served Restraining Notices with Information Subpoenas on the Morgan Guaranty Trust Company and the New York Stars. (Appellee's Appendix, pp. 10a, 14a, respectively) The First National Bank of Boston was also served with a Restraining Notice with Information Subpoena. (Appellee's Appendix pg. 3a)

The subject matter of the California action was a claim by plaintiffs that the defendant had breached an oral agreement to sell to them a one-half (1/2) stock interest in the corporation that owns the National Basketball Association team, the Boston Celtics. The jury awarded plaintiffs a choice of the one-half stock interest, or in lieu thereof, the cash equivalent. In open Court the plaintiffs elected to take the cash. Thereafter the Honorable District Court Judge, Manuel Real, directed that a supersedeas bond in the amount of $3,000,000 be posted as a condition of the stay of the execution of the California judgment. To date, no such supersedeas bond has been posted by the defendant. (Appendix I, pg. 9)

The California District Court rejected the defendant's offer to post as security, in lieu of the $3,000,000 supersedeas bond, all of the assets that the defendant owned. The defendant offered to post as security the following:

(1) a second lien on defendant's equity in the Boston Celtics basketball team. The defendant's equity according to plaintiffs' own testimony at trial is valued at $5 million. (The existence vel non of an oral option from defendant to plaintiffs to purchase 50% of the team was the subject matter of the California suit);

(2) a second lien on all of the defendant's encumbered assets, the estimated value of his equity in which is about $4 million; in the main, these assets consist of the defendant's holdings of 55% of the outstanding common stock of Leisure Technology Corporation or about two million shares. The defendant is the founder, Chairman of the Board, President and Chief Operating Officer of the Company; and

(3) a bond in whatever sum any bonding company would write based upon defendant's unencumbered assets which do not exceed $900,000 in value.

The items listed in (1), (2) and (3) represented all of the assets that the defendant held on the date of judgment that could be available for purposes of execution on that date. (See Affidavits of Robert J. Schmertz, sworn to August 18, 1974 and August 16, 1974 - Appellee's Appendix pp. 37a-52a)

On September 24, 1974, the defendant, by Order to Show Cause, moved to strike the registration of the California judgment in the Southern District. At that time the defendant also made application for a temporary restraining order. The Court below entered a temporary restraining order restraining the plaintiffs "from attempting to execute on said judgment, serving any further restraining notices or information subpoenas, or further proceeding on restraining notices or subpoenas previously served or further examining the defendant or non-party witnesses, or in any other way further interfering with defendant's property . . . ." (Appendix II, pg. 4A) During the course of the argument, plaintiffs moved for an order of attachment in a proposed plenary action in this District on the California judgment. The Court below also set September 30, 1974 for the hearing on defendant's motion to strike the registration and on the plaintiffs' application for an order of attachment.

During the pendency of the temporary restraining order entered by the Court below, the plaintiffs brought a plenary action on the California judgment in the Superior Court for Suffolk County of Massachusetts. (Appellee's Appendix pg. 25a)

Subsequent to the hearing on the temporary restraining order, the Ninth Circuit Court of Appeals, on September 25, 1974, following a motion for a rehearing en banc, remanded to the District Court for further consideration the question of the sufficiency of the assets offered by the defendant in lieu of the $3,000,000 supersedeas bond. (Appellee's Appendix, pg. 36a)

On September 30, 1974, the Court below granted defendant's motion to strike the registration of the California judgment, denied the order of attachment, struck the complaint in the plenary action and issued an injunction against plaintiffs' proceeding to execute on the judgment outside the State of California. (Appendix II, pg. 15A)

The Court below denied a motion for a stay pending appeal on September 30, 1974. This Court (Mansfield, J.) denied an ex parte application on October 1, 1974 for a stay pending a hearing on an application for a stay pending appeal, and, after argument (Kaufman, C.J., Smith and Mansfield, J.J.), denied a stay pending appeal on October 8, 1974.

On October 7, 1974, the California District Court

rejected the defendant's proposal for posting alternative security because the defendant refused to stipulate to the value of the Boston Celtics stock. The defendant's refusal to so stipulate was based on a fear of prejudicing his right to question on appeal the amount of damages awarded the plaintiffs. The California District Court's October 7th Order is presently on appeal in the United States Court of Appeals.*

Questions Presented

The order of the District Court presents the following questions for review:

1. Can the judgment of the California District Court be registered in the Southern District pursuant to 28 U.S.C. § 1963 where an appeal from such judgment is pending and the judgment has not been superseded by the posting of a $3,000,000 bond required by the California District Court as a condition of the stay of its enforcement?

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* Although the account of the proceedings in the California District Court are not part of the record on this appeal they appear to be an appropriate subject of judicial notice pursuant to F.R. Civ. P. 43. Copies of the transcript of such proceedings will be made available to this Court upon request.

2. If the California judgment cannot be registered pursuant to 28 U.S.C. § 1963, does a plenary action lie that seeks a judgment in the Southern District based upon the California judgment?

3. Assuming that 28 U.S.C. §1963 is not an absolute bar to the proposed plenary action in the Southern District, should the prosecution of the plenary action be stayed as an exercise of discretion where (a) the question of the adequacy of the defendant's proposed alternative security rejected by the California District Court is on appeal to the Ninth Circuit, and (b) the rejection of the defendant's proposal for alternative security presents substantial constitutional questions in respect to the burdening of defendant's right to appeal, and further (c) the enforcement of the California judgment will result in irreparable injury to the defendant by the distress sale of his unique assets for which there is not a readily available market?

4. Assuming that it was not improper for the Court below to bar the prosecution of the plenary action, was it an abuse of discretion to grant an injunction barring the enforcement of the California judgment anywhere but in the State of California pending the determination of the appeal on the merits?

POINT I

28 U.S.C. §1963 BARS THE REGISTRATION OF ANY JUDGMENT FROM WHICH AN APPEAL IS PENDING EVEN WHERE SUCH JUDGMENT HAS NOT BEEN STAYED BY THE POSTING OF THE REQUIRED SUPERSEDEAS BOND

The defendant submits that no judgment from which an appeal is pending can be registered pursuant to 28 U.S.C. § 1963 in a foreign district even if such judgment has not been superseded in the district it was rendered by the posting of a supersedeas bond. This may appear anomalous since it allows the plaintiff to have execution in the district that the judgment was rendered but not in the foreign district where it is subsequently registered. However, an examination of the words of the statute indicates that this was the result intended by Congress.

> A judgment in an action for the recovery of money or property now or hereafter entered in any district court which has become final by appeal or expiration of time for appeal may be registered in any other district by filing therein a certified copy of such judgment. A judgment so registered shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner. (Emphasis added).

The language employed by Congress is clear -- "final by appeal or expiration of time for appeal". There is nothing in the statute that suggests that a posting of a supersedeas bond is required in order to bar the registration in a foreign district of the judgment. In addition, the legislative history of the statute is devoid of anything that contradicts this construction based upon its plain meaning. See Ohio Hoist Manufacturing Co. v. LiRocchi, 490 F.2d 105, 108 (6th Cir. 1974), app. dis. ___U.S. ___ (June 4, 1974); Hearings on H. B. 3214 before a Subcommittee of the House Committee on the Judiciary, 80 Cong., 1st Sess., Ser. 2 at 28 (1947).

Furthermore, judicial precedent construing or commenting upon the statute, without exception, indicates that when an appeal is pending from a judgment it cannot be registered in another federal district even if that judgment has not been superseded by the posting of a bond. Abegglen v. Burnham, 94 F. Supp. 484 (D. Utah 1950); Olympic Ins. Co., v. H. D. Harrison, Inc., 413 F.2d 973 (5th Cir. 1969); Bros, Inc. v. W. E. Grace Mfg. Co., 261 F.2d 428 (5th Cir. 1958).

In Abegglen, supra, the District Court of Utah granted the defendant's motion to strike the registration of a judgment of the District Court of Idaho on the ground that an appeal was pending in the Ninth Circuit Court of Appeals. The defendant therein had not posted a supersedeas bond; the court stated (94 F. Supp. at 485):

> An appeal from the judgment of the United States District Court of Idaho is pending in the Court of Appeals for the Ninth Circuit. No supersedeas bond had been filed at the date of the proceedings herein.

And in Olympic Ins. Co. v. H. D. Harrison, supra pg. 10, the court stated in a dictum (413 F.2d at 974):

> Even though the judgment below is not superseded, the plaintiff-appellee probably cannot execute its substantial judgment outside the Eastern District of Louisiana until it becomes final. See Abegglen v Burnham, D.C. Idaho, 1950, 94 F. Supp. at 484.

In Bros, Inc. v. W. E. Grace Manufacturing Co., supra pg. 10, the court noted, 261 F.2d at 433 N.4, that the judgment in question:

> ...was not a mere ancillary petition to enforce the Ohio judgment, which is not ripe for the streamlined extra-territorial enforcement machinery if an appeal is pending undetermined. 28 U.S.C. § 1963; and see Hanes Supply Co. v. Valley Evaporating Co., 5 Cir., 261 F.2d 29 (2d paragraph of opinion).

It should be noted that plaintiffs have not cited a single case which holds or in dictum supports the proposition that a judgment from which an appeal is pending can be registered pursuant to 28 U.S.C. § 1963.

POINT II

SINCE THE CALIFORNIA JUDGMENT CANNOT BE REGISTERED PURSUANT TO 28 U.S.C. § 1963 NO PLENARY ACTION CAN BE BROUGHT ON THAT JUDGMENT

The defendant contends that because the judgment cannot be registered pursuant to 28 U.S.C. § 1963 it cannot be the subject of a plenary action. In the alternative, the defendant also contends that even if the plaintiffs' plenary action can be maintained this Court should exercise its discretion and not allow the attachment as well as stay the prosecution of the plenary action. Point III, infra.

The plaintiffs, in an effort to avoid the bar of § 1963 (supra, Point I), have attempted to commence a plenary action in the Southern District on the California District Court judgment. As a prelude to that action plaintiffs requested that the issuance of an order of attachment pursuant to

F.R.C.P. § 64 and N.Y. C.P.L.R. § 6201(7). The Court below refused to grant an order of attachment since it held that the plenary action would not lie, reasoning that to allow the plenary action would "manifestly defeat the objectives of § 1963."

In Abegglen v. Burnham, supra pg. 10, the court noted (94 F. Supp. 486) that if a judgment could be registered pursuant to § 1963 while an appeal is pending the following negative consequences would flow:

> The judgment might be registered in any number of districts, if it can be registered here, with the consequent necessity of employment of counsel in all of the districts and applications to various courts of appeals for orders to stay the proceedings. The judgment debtor should not be subject to this annoyance and oppression. To deny the construction asked by the plaintiff provides a more orderly procedure.

The same negative consequences flow from permitting plaintiff to proceed in a plenary action based on the California judgment. Consequently, to bar registration but to permit the prosecution of an action on the judgment is contradictory for it negates the policy considerations operating in respect to § 1963, i.e., avoidance of harrassing the judgment debtor and forcing him to protect his property against execution

when his attention and resources should be devoted to pressing his appeal. This is particularly so in this case where plaintiffs have also commenced a plenary action in Massachusetts thereby harassing the defendant in two jurisdictions where his property is situated.

The construction of § 1963 urged by plaintiffs would result in a defendant being deprived of his right to appeal where substantial questions are presented as to the merits of the judgment appealed from. It is undisputed in this case that substantial questions are presented by the appeal in the Ninth Circuit since the plaintiffs have made no motion to dismiss the appeal as frivolous. The plaintiffs insist that this prejudice to the defendant is immaterial in respect to the construction of § 1963 for they argue that the remedies afforded by the section for the enforcement of judgments are not exclusive but merely cummulative to those afforded by a plenary action. They assert that since the judgment can be enforced in the District where rendered because no supersedeas bond has been posted, then logic compels that the judgment should be equally enforceable in other districts. This parallel overlooks the power of the Court which rendered the judgment sought to be enforced pending appeal to control the execution process in accordance with equitable

principles. Cf. N.Y. C.P.L.R. §5240.

This equitable control of the execution process by the Court rendering the judgment is possible since it has the knowledge of the facts and the legal issues presented by the appeal, as well as the best perspective of the relative merits of the appeal. The foreign district court in which execution is sought does not have this view of the case and the merits of the appeal. Therefore, to deny execution pending appeal in all districts other than the district where a judgment is rendered is in accordance with the policies of a multi-district judicial system.

Defendant is aware of the case of Slade v. Dickinson, 82 F. Supp. 416 (W.D. Mich. 1949) which has been referred to in dictum in subsequent decisions [see, e.g., Juneau Spruce Corp. v. International Longshoremen's Union, 128 F. Supp. 715 (N.D. Cal. 1955)], as authority for the proposition that an action on the judgment lies even if such a judgment cannot be registered. However, any suggestion in the Slade decision that an action on the judgment lies even though it cannot be registered pursuant to § 1963 is also dictum for the complaints involved were filed prior to the effective date of § 1963. See N. 1 at 82 F. Supp. 418. Furthermore, in none of the subsequent cases that cite Slade was the issue directly

presented of whether a plenary action on the judgment lies if it could not be registered under 28 U.S.C. § 1963.

It has been noted that the relevant legislative history indicates that when Congress enacted § 1963 it intended to establish a comprehensive, all encompassing procedure for the enforcement of foreign district court judgments. See Hanes Supply Co. v. Valley Evaporating Company, 261 F.2d 29 (5th Cir. 1958). In Hanes, Judge Tuttle noted, without passing on the question, on 261 F.2d at 30:

> Since the enactment of the registration statute [28 U.S.C. § 1963] it is not at all clear that a judgment creditor who has obtained a judgment in one district can make this judgment the basis of a plenary suit in another district. The legislative history of this section clearly indicates that the registration statute is intended to provide all the benefits deriving from a local judgment on a "foreign" judgment without subjecting either plaintiff or defendant to the expense of a second lawsuit.

Plaintiff's references in brief (pp. 21-26) to the Uniform Enforcement of Foreign Judgments Act, N.Y. C.P.L.R. Art. 54, § 5401 et seq. in support of the proposition that § 1963 is merely cummulative and not exclusive are particularly inapposite in light of this Court's recent decision in Knapp

v. McFarland, 462 F.2d 935 (2nd Cir. 1972) (per Mansfield, J.). There it was noted that:

> A glance at the legislative history of the statute under consideration makes it clear that Art. 54 was intended to apply only to money judgments rendered by sister states of the United States and not to such judgments of federal district courts, whether in New York or elsewhere. (462 F.2d at 939)

Furthermore, the plaintiffs would be unable to register the California district court judgment pursuant to N.Y. C.P.L.R. 5018(b) because it could not be registered pursuant to § 1963. This is so because 5018(b) allows docketing in the county clerk's office of federal judgments "rendered or filed within the state." As this Court further noted in Knapp v. McFarland, id:

> Section 5018(b)...provides a method for enforcement not only of judgments of federal district courts "rendered" in a district located within the state but also of judgments of federal district courts elsewhere which have been "filed" in a federal court within the state pursuant to 28 U.S.C.A. § 1963.

Thus plaintiffs' references to Article 54 are far from dispositive. Analysis indicates that the same question is presented under the law of New York, as is here, i.e. can a federal judgment rendered in a district outside the state be the subject of a plenary action where it cannot be registered

under N.Y. C.P.L.R. 5018(b) because it cannot be "filed" pursuant to 28 U.S.C. § 1963.

Defendant notes that N.Y. C.P.L.R. 5018(b) distinguishes for execution purposes between those federal judgments "rendered" in contrast to those "filed" within the state. This distinction is consistent with defendant's contention that execution can be more equitably controlled by a court that "rendered" a judgment than by one in which it is merely "filed". The construction of § 1963 urged by the defendant also takes into account this distinction and should be adopted.

POINT III

IF THIS COURT DETERMINES THAT 28 U.S.C. §1963 IS NOT AN ABSOLUTE BAR TO THE PROPOSED PLENARY ACTION IN THE SOUTHERN DISTRICT, THEN AT THE MINIMUM THIS COURT SHOULD STAY THE PROSECUTION OF THE PLENARY ACTION UNTIL THE NINTH CIRCUIT RULES ON THE SECURITY QUESTION, AND MORE APPROPRIATELY UNTIL THE DETERMINATION OF THE MERITS OF THE APPEAL

A. At the Minimum, a Stay Pending Resolution of the Security Question Should be Granted

It is clear that plaintiffs' reasons for their actions to date are to coerce the defendant into abandoning his appeal of the adverse California District Court judgment. The record reflects that the defendant offered to post as security in lieu of the $3,000,000 supersedeas bond required by the California District Court the following:

(1) a second lien on defendant's equity in the Boston Celtics Basketball Team. The defendant's equity according to plaintiff's own testimony at trial is valued at $5 million. (The existence vel non of an oral option from defendant to plaintiffs to purchase 50% of the team was the subject matter of the California suit);

(2) a second lien on all of the defendant's encumbered assets, the estimated value of his

equity in which is about $4 million; in the main these assets consist of the defendant's holdings of 55% of the outstanding common stock of Leisure Technology Corporation or about two million shares. The defendant is the founder, Chairman of the Board, President and Chief Operating Officer of the Company;

(3) a bond in whatever sum any bonding company would write based upon defendant's unencumbered assets, which do not exceed $900,000 in value.

The items listed in (1), (2) and (3) represented all of the assets that the defendant held on the date of judgment that could be available for purposes of execution on that date.

Thus the defendant offered as security for his appeal everything that he owned, and thereby made everything he owned subject to execution if he did not prevail on his appeal. Furthermore, in respect to item (1) above, the California action was based on a purported breach by the defendant to sell 1/2 of his interest in the Boston Celtics basketball team. The jury awarded plaintiffs 1/2 of the stock of the ball team (see Item 1), or its cash equivalent. The plaintiffs elected to take the cash in

respect to the verdict but refused to take as security for the appeal the very item they sought to recover in their action and which the jury awarded them as an alternative to the cash.

These tactics are indicative of plaintiffs' intent, i.e. coercion of the defedant to the point that he will abandon his appeal and agree to a settlement extracted under economic duress. The efforts in this District and in Massachusetts to obtain execution are part of this pattern for they present defendant with the choice of either liquidating his assets in order to post the $3,000,000 supersedeas bond or suffering subsequent execution on the plenary judgment and thereafter proceeding against plaintiffs to get his money back if he prevails on the appeal. Both alternatives involve the certainty of ruinous financial loss to the defendant.

The execution sale of the Boston Celtics stock will be under distress conditions. This is also true in respect to the execution sale of defendant's control interest (55%) in the Leisure Technology Corporation. If the defendant prevails on his appeal he could not recoup his losses from the plaintiffs since the proceeds of

the execution sale of the Celtics and Leisure Technology stock would be at a fraction of their fair market value. In addition, the defendant would not recoup the loss sustained by losing control of the Leisure Technology Corporation, a company that he founded and developed for twenty years.

The same results will occur if the defendant were to sell these assets on his own behalf in order to obtain funds to post the supersedeas bond for such sales would also be under distress conditions.

These assets are unique. In the case of the Celtics, as in respect to all professional basketball teams, it is not a readily saleable asset.

Furthermore, if the defendant's interest in the Leisure Technology Corporation were sold, the price obtained would be drastically depressed by the large volume of defendant's shares being disposed of at a single time.

It is well-settled that a court can stay a pending action to await the resolution of a prior commenced action between the same parties involving the same or closely related issues. Mattel, Inc. v. Louis Marx & Co., Inc., 353 F.2d 421 (2d Cir. 1965); see also William Gluckin & Co., v.

International Playtex Corp., 407 F.2d 177 (2d Cir. 1969). Thus the defendant contends that even if the plenary action is not barred by §1963 it should be stayed pending a final determination of the security issue by the Ninth Circuit for the issue before this Court of whether plaintiffs should have execution on the California judgment is directly related to the question presently before the Ninth Circuit of whether the alternative security is appropriate.

Given the irreparable injury that the defendant will suffer from the distress sale of his unique assets, it is respectfully submitted that it would be precipitous to permit execution in the Southern District before the issue of the alternative security has been finally resolved in the Ninth Circuit or the Supreme Court. Such a stay would also be appropriate since there are substantial constitutional questions regarding the burdening of defendant's right to appeal that are involved in the Ninth Circuit proceedings. See Lindsey v. Normet, 405 U.S. 56 (1972); Thompson v. Mazo, 421 F.2d 1156 (D.C. Cir. 1970).

B. A Stay Pending Resolution of the Appeal on the Merits from the California Judgment Should be Granted

It has been noted that a federal court should recognize the possibility of a reversal on appeal of a

state court judgment that is sought to be given res judicata effect in the federal court. It has been further noted that such a federal court should mold its judgment in that context so as to avoid any conflict of jurisdiction and accomplish substantial justice. Ray v. Halsey, 214 F.2d 366 (5th Cir. 1954); Goldfarb v. Wright, 135 F.2d 188 (2d Cir. 1943).

A stay in this case of the plenary action pending the appeal on the merits effects substantial justice between the parties. As noted above, the defendant will suffer ruinous financial consequences from the distress sale of his unique assets. In addition, if the defendant prevails on his appeal on the merits, he could not recoup the full extent of his losses from the plaintiffs. In contrast to the injury that the defendant sustains by execution prior to the determination of the merits of his appeal, the plaintiffs will suffer no injury awaiting such final resolution of the issues since the defendant will continue to give plaintiffs notice of an intention to sell any of his assets in accordance with this Court's order of October 8, 1974 herein.

Thus the defendant submits that even if the plenary action on the California judgment is not barred by § 1963 the plenary action should be stayed pending a resolution of the defendant's appeal on the merits from the California judgment.

POINT IV

IT WAS NOT AN ABUSE OF DISCRETION FOR THE COURT BELOW TO BAR THE ENFORCEMENT OF THE CALIFORNIA JUDGMENT ANYWHERE BUT IN THE STATE OF CALIFORNIA PENDING THE DETERMINATION OF THE APPEAL ON THE MERITS FROM THE CALIFORNIA JUDGMENT

The Court below properly exercised its discretion when it enjoined the enforcement of the California judgment outside California pending a final determination of the appeal on the merits for the injunction was necessary to effectuate its judgment and to prevent relitigation of the issues determined below.

Plaintiffs' references in their brief (pp. 10-11) to 28 U.S.C. § 2283 are particularly inappropriate since the statute allows a federal court to stay proceedings in a state court ". . . where necessary . . . to protect or effectuate its [the federal court's] judgments.

It has been noted in Necchi Sewing Machine Sales Corp. v. Carl, 260 F. Supp. 665, 669 (S.D.N.Y. 1966), that § 2283 was amended to include the above language:

> . . . primarily to prevent relitigation in state courts of matters which have already been decided by a federal court. 1A Moore, Federal Practice ¶ 0.208 [3.3] (1965); see Jacksonville Blow Pipe Co. v. Reconstruction Finance Corp., 244 F.2d 394 (5 Cir. 1957); National Labor Relations Board v. Underwood Machinery Co., 198 F.2d 93 (1 Cir. 1952).

The Court below held that the California judgment could not be registered pursuant to 28 U.S.C. § 1963 because an appeal was pending and thus the California judgment could not be the subject of a plenary action for to permit such an action would violate the "policies of § 1963."*

It was argued below that these "policies" entailed the prevention of irreparable injury to a judgment debtor as well as the avoidance of harrassment to him by seeking execution pending appeal in districts where his property was situated thereby forcing him to devote resources to protecting his property that should be used to pressing his appeal. The plaintiffs' conduct in this case is protypical of that which the statute seeks to deter. The plaintiffs, in connection with their efforts to gain enforcement in the Southern District, served restraining notices on Morgan Guaranty

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* In this connection we respectfully direct the Court's attention to The Annual Report of the Director, Administrative Office of the United States Courts, pg. A-2 (1972) where it is indicated that in the Ninth Circuit the reversal rate for fiscal year ending June 30, 1972 for civil actions was 31.8%.

Trust Company, the New York agency of the First National Bank of Boston and the New York Stars. In their plenary action in Massachusetts, plaintiffs served restraining notices on the defendant, the Boston Celtics Basketball Club, Inc. and the First National Bank of Boston. The effect of the restraining notices is to fetter the defendant in the operation of his economic affairs and results in financial embarrassment to him.

The objective of plaintiffs' plenary actions in the Southern District and in Massachusetts is enforcement of a judgment with resultant ruinous financial consequences to the defendant. The rationale of the judgment of the Court below is that enforcement pending appeal of the California judgment would harrass the defendant and result in irreparable injury to him. Consequently, in order to "protect or effectuate its judgment[s]" it was necessary for the Court below to grant the injunction. It would be a non sequitur to hold that a plenary action in the Southern District would result in irreparable injury to the defendant but a comparable action in a state court would not have that same effect.

It is clear that the injunction granted below should be affirmed if this Court agrees that § 1963 is a bar to a plenary action. This is so even if in another jurisdiction where enforcement is sought there is no rule comparable to § 1963 in respect to non-enforcement pending appeal. The plaintiffs invoked the jurisdiction of the Court below. As a consequence of plaintiffs' attempt to use the processes of the Court below, it held that plaintiffs' attempts at enforcement if not enjoined would result in irreparable injury and harrassment to the defendant. There is nothing in § 2283 which should permit plaintiffs to choose another forum in which to relitigate the question of irreparable injury to the defendant as well as make another attempt at harrassing him. These issues have been decided adversely to plaintiffs by the very Court whose jurisdiction they sought to invoke.

The injunction should be affirmed even if this Court determines that as a matter of discretion it will order a stay of the plenary action pending the resolution of the appeal on the merits in the Ninth Circuit.

This is so because the gravamen of such an order would be that the stay is necessary to prevent the harrassment of as well as irreparable injury to the defendant. For the reasons given above the plaintiffs should not be permitted to relitigate these issues in another jurisdiction.

If this Court decides to modify the order appealed from and hold that a stay of the plenary action will be granted only until a final resolution of the security question, then it should affirm the injunction and remand the matter to the District Court with instructions to monitor the plenary action pending the appeal on the merits in accordance with general equitable principles in the event the security issue is decided adversely to the defendant. Cf. N.Y. C.P.L.R. § 5240; see, e.g., Wandschneider v. Bekeny, 75 Misc. 2d 32 (and cases cited at pp. 37-38) (Sup., West . Cty 1973).

In closing, the injunction was a proper remedy against plaintiffs' attempts to force an abnandonment by the defendant of his appeal. As noted in 1 A Moore's Federal Practice ¶ 0.227 (1974):

Conclusion

For the reasons stated above, the order appealed from should be affirmed in all respects.

Respectfully submitted,

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> A well-settled doctrine has existed that a federal district court has the power to enjoin the continued prosecution or the fomenting of vexatious and groundless proceedings, or where there is a multiplicity of suits and such suits are in furtherance of a fraudulent scheme against the defendant or are otherwise inequitable and result in irreparable harm and injury to him. (Footnote omitted)

See also Sovereign Camp Woodman of the World v. O'Neill, 266 U.S. 292 (1924). Moreover, it has been specifically noted that this equitable power is not limited by 28 U.S.C. § 2283. See Moore's, supra; American Ins. Co. v. Lester, 214 F.2d 578 (4th Cir. 1954).

Thus, the injunction granted by the Court below should be affirmed.

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